



United States Department of the Interior

OFFICE OF THE SOLICITOR

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MEMORANDUM

To: Mark Zundel
Acting Chief
Geographic Data Service Center
Office of Trust Responsibilities
Bureau of Indian Affairs

Thru: Larry Scrivner
Acting Director
Office of Trust Responsibilities
Bureau of Indian Affairs

From: Suzanne R. Schaeffer *S. R. Schaeffer by amk*
Assistant Solicitor
Environment, Land and Minerals Branch
Division of Indian Affairs

Subject: Reservation Boundaries in Dispute

This memorandum responds to certain questions presented in your October 10, 2002, memorandum to David Moran of my staff, regarding boundaries of certain Indian reservations. Pursuant to our discussion with Larry Scrivner, Acting Director, Office of Trust Responsibilities, this office is providing responses only to those questions posed in your memorandum that are legal in nature. Accordingly, this response addresses only the legal questions raised with respect to the boundaries of the Uintah and Ouray, Devil's Lake, Pine Ridge and Rosebud Reservations. If you have any questions regarding the following answers, please contact Angela Kelsey of my staff at (202) 219-2407.

UINTAH and OURAY RESERVATION

Question: Is the United States Tenth Circuit Court of Appeals' ruling in *Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah*, 114 F.3d 1513 (10th Cir. 1997), final? Has it been subsequently challenged?

Answer: Yes, the Tenth Circuit Court of Appeals' holding in *Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah*, 114 F.3d 1513 (10th Cir. 1997), cert. denied, 522 U.S. 1107 (1998), is final. We are not aware of a subsequent challenge to the decision.

Question: If it is final, are the boundaries of the Uintah and Ouray Reservation to be determined only after title searches and possibly surveys are concluded? Or should we continue to use the pre-1902 boundary?

Answer: To determine the boundaries of the Uintah and Ouray Reservation, it may be necessary to conduct a title search of individual tracts and survey them. Both the Supreme Court in *Hagen v. Utah*, 510 U.S. 399 (1994), and the Tenth Circuit concurred that the Uintah and Ouray Reservation was not disestablished. However, the Reservation was diminished and no longer includes the lands that passed from trust to fee status pursuant to non-Indian settlement under the 1902-1905 allotment legislation. The Tenth Circuit noted that a survey may be necessary to determine the exact boundaries of the lands that were removed from the Reservation.

DEVIL'S LAKE RESERVATION

(aka SPIRIT LAKE RESERVATION or FORT TOTTEN RESERVATION)

Question: Does the Solicitor's Office recognize the Sisseton and Wahpeton Sioux Tribe's claim to the bed of Devil's Lake?

Answer: No, the Department of Justice has asserted for several years in litigation brought by the Sisseton-Wahpeton Tribe (now called the Spirit Lake Tribe) that the United States does not recognize the Tribe's claim to the bed of Devil's Lake. See *Spirit Lake Tribe v. North Dakota*, 262 F.3d 732 (8th Cir. 2001), *petitions for rehearing and rehearing en banc denied*, 2001 U.S. App. LEXIS 24546 (8th Cir. Nov. 12, 2001), *cert. denied*, 535 U.S. 988 (2002). The Solicitor's Office is bound by the United States' position in the litigation in the above-referenced case unless new evidence previously unavailable is discovered. In *Spirit Lake*, the United States argued that Devil's Lake was not included in the Devil's Lake Reservation by the Treaty of February 19, 1867, 15 Stat. 505. The United States asserted that it held the legal title to the Lake until 1889 when it was conveyed to the State of North Dakota upon its admission to statehood under the "equal footing doctrine." On July 7, 1971, the State of North Dakota conveyed its title to the bed of Devil's Lake to the United States in partial payment for the Bureau of Reclamation's Garrison Diversion Project.

Question: Has there been a definitive court resolution to the lake bed issue?

Answer: No, the Eighth Circuit Court of Appeals did not decide the Spirit Lake Tribe's case on the merits, so it did not determine the ownership of the bed of Devil's Lake. Rather, the decision dismissed the Tribe's quiet title lawsuit against the United States and the State of North Dakota. Unless Congress enacts a special statute that would permit the Spirit Lake Tribe to sue the United States, it is unlikely that ownership of the lake bed will be litigated directly any further. But it is possible that the ownership issue could be raised in other contexts, such as a lawsuit regarding hunting or fishing enforcement authority. For that reason, discussions have been initiated among the Bureau of Reclamation, the Bureau of Indian Affairs, the State of North Dakota, and the Spirit Lake Tribe that may lead to a potential settlement. Nevertheless, the United States' position regarding the Spirit Lake Tribe's claim to the lake bed continues to be that the Treaty of

February 19, 1867, 15 Stat. 505, did not include Devil's Lake within the exterior boundaries of the Devil's Lake Reservation.

Question: Is the southwestern direct line to the nearest point on the Sheyenne River the correct line?

Answer: See answer to next question.

Question: Is there survey documentation of the southwestern line or the southeastern line? Are there any relevant court cases regarding the western wedge shaped area?

Answer: The phrase "direct line to the nearest point on the Sheyenne River" is contained in the Treaty of February 19, 1867, 15 Stat. 505, which created the Devil's Lake Reservation. However, the western boundary has been modified as a result of an agreement the United States reached with the Sisseton, Whapeton, and Cut Head (Yanktonais) Bands of Sioux of the Devil's Lake Reservation on December 12, 1889, 26 Stat. 1037. That agreement was confirmed by a statute, the Act of March 3, 1891, 26 Stat. 989, 1010, and the decision of the Indian Claims Commission (ICC) in *Lower Sioux Indian Community v. United States*, 30 Ind. Cl. Comm. 463, and its order of February 27, 1974, 33 Ind. Cl. Comm. 389, which granted the Bands a final award of \$8,473,221.26. The ICC decision was affirmed in the *United States v. Lower Sioux Indian Community*, 207 Ct. Cl. 492, 519 F.2d 1378 (1975). Both the 1891 statute and the ICC decision compensated the Sisseton, Whapeton, and Cut Head (Yanktonais) Bands of Sioux for the United States' taking of 64,000 acres from the western boundary of the Devil's Lake Reservation. The taking was the result of an erroneous 1875 survey and subsequent sale of land in that area to non-Indian homesteaders under the mistaken belief that it was public land. Congress approved the taking when it enacted the 1891 statute and compensated the Bands for the loss of the property. The 1891 statute can be interpreted as an expression of Congressional intent to remove the 64,000 acres from the Reservation and thereby diminish its western boundary. As a result, the western boundary should reflect the exclusion of those 64,000 acres.

THE PINE RIDGE RESERVATION

Question: Does the 'hereafter allotted' portion of the statute mean that in theory the entirety of Bennett County could be repurchased by the tribe and therefore the reservation should include all of Bennett County?

Answer: The Pine Ridge Reservation was created by the Act of March 2, 1889, 25 Stat. 888, for the Oglala Sioux. The Act of May 27, 1910, 36 Stat. 440, "authorized and directed the Secretary of the Interior to sell and dispose of all that portion of the Pine Ridge Indian Reservation, in the State of South Dakota, lying and being in Bennett County and described as follows: "... except for such portions thereof as have been or may be hereafter allotted to Indians or otherwise reserved, and except lands classified as timber lands: *Provided, . . .*" The lands were allotted and Bennett County was opened for settlement. The event of "hereafter allott[ing]" lands occurred in the early 1900's.

By Secretarial Order dated June 10, 1936, the undisposed of lands in Bennett County opened for settlement under the 1910 Act were "restored to tribal ownership" and were "added to and made a part of the existing reservation . . ."

The United States participated only as amicus before the Eighth Circuit Court of Appeals in *Cook v. Parkinson*, 525 F.2d 120 (8th Cir. 1975), a criminal case that discussed Bennett County as no longer being part of the Reservation. The United States is not bound by that decision because it did not participate in the litigation. The United States was a party in *United States v. Bennett County*, 394 F.2d 8 (8th Cir. 1968), in which the State of South Dakota had to obtain permission from the Department of the Interior in order to fix roads or condemn property in Bennett County, consistent with the property's reservation status. The United States has not litigated the status of Bennett County as part of the Reservation, and until it does, we see no need for GDSC to change its maps, which include Bennett County as part of the Reservation. However, assuming that Bennett County is not part of the Reservation, as your question does, the whole of Bennett County could theoretically be reacquired by the Tribe, taken into trust with the approval of the Bureau of Indian Affairs, and proclaimed a part of the Reservation.

Question: Also, a small section (Meridian 06, Township 035N, Range 045W, Section-024) of trust land extends into Sheridan County, Nebraska. Should this section be included in the Reservation boundary?

Answer: Yes. It is part of the Pine Ridge Reservation. By Executive Order No. 2980 of February 20, 1904, the section was made a permanent part of the Pine Ridge Sioux Indian Reservation.

THE ROSEBUD RESERVATION

Question: Did the U. S. Supreme Court decision in *Rosebud Sioux Tribe v. Kneip*, 430 U. S. 584 (1977), reduce the Rosebud Reservation boundary to just Todd County?

Answer: The original boundaries of the Rosebud Reservation were established by the Act of March 2, 1889, 25 Stat. 888. The Supreme Court reviewed the Act of April 23, 1904, 33 Stat. 254, the Act of March 2, 1907, 34 Stat. 1230, and the Act of May 30, 1910, c. 260, 36 Stat. 448, and determined that the exterior boundaries of the Rosebud Reservation were diminished by those statutes. Gregory County was removed from the Reservation by the 1904 statute, Tripp and Lyman Counties were removed by the 1907 statute, and Mellette County was removed by the 1910 statute. Todd County remains within the exterior boundaries of the Rosebud Reservation.

By Secretarial Order of January 12, 1938, 4,600 acres of undisposed of land opened under the statutes were restored to tribal ownership and were "added to and made a part of the existing reservation." These lands should be depicted as part of the Reservation, notwithstanding their location, as well as those lands classified as timber lands and reserved to the Tribe and not opened to settlement in the above referenced statutes.

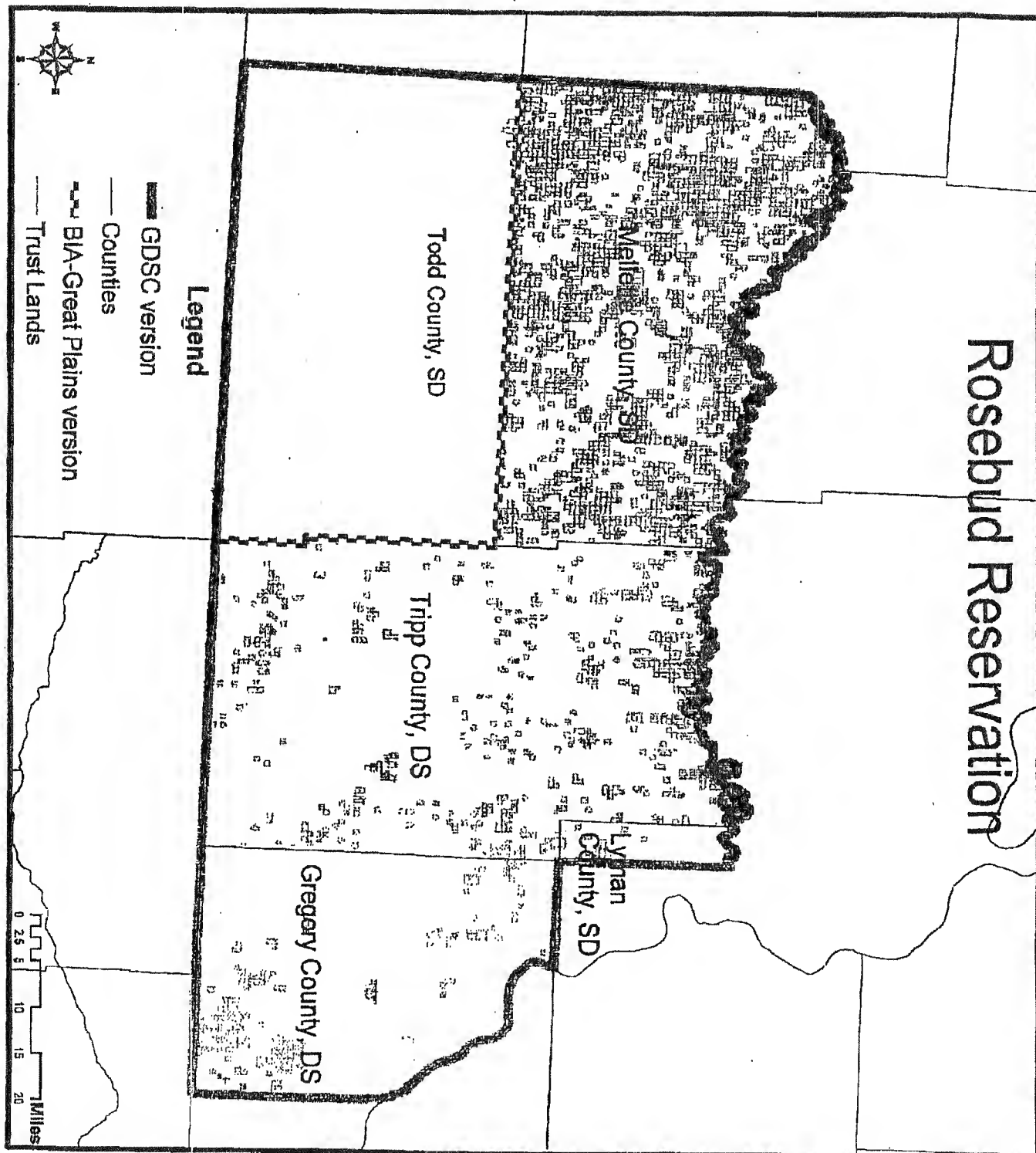
Question: Or are all the trust lands outside of Todd County individual reservation boundaries?

Answer: No. Any lands held in trust for individual Indians outside Todd County are outside the exterior boundaries of the Rosebud Reservation, are not part of the Reservation, and do not constitute individual reservation boundaries, although they would still be "Indian country" under 18 U.S.C. § 1151. However, if any of these trust lands are part of the lands restored to the Tribe by the Secretarial Order, they would be considered part of the Reservation.

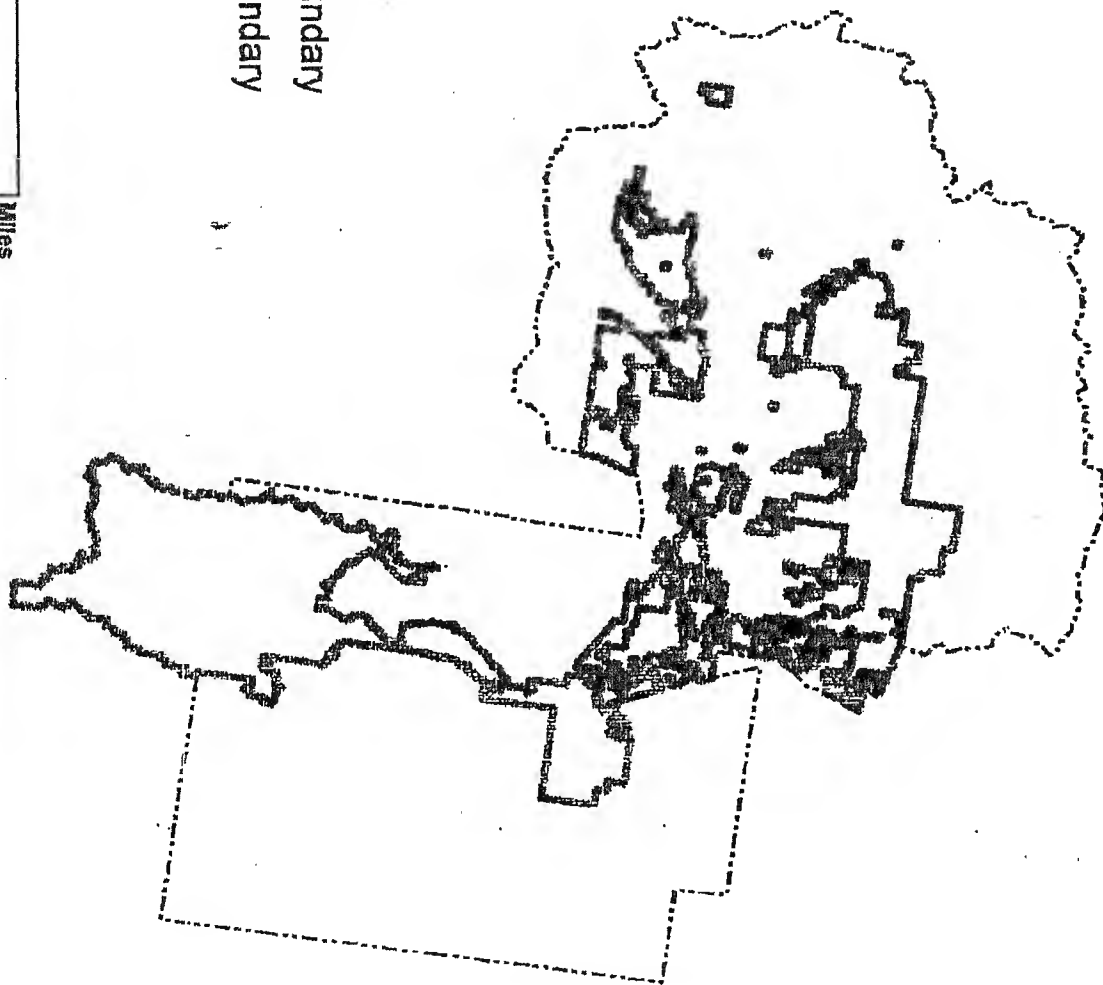
Question: Or do all five counties make up the Reservation boundary?

Answer: No. The Supreme Court determined in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), that the Reservation's boundaries were diminished by the Acts of April 23, 1904, March 2, 1907, and May 30, 1910.

cc: Edith Blackwell, Acting Associate Solicitor
Scott Keep, Assistant Solicitor
Rich Aldrich, Field Solicitor, Billings
Priscilla Wilfahrt, Field Solicitor, Twin Cities
Margot Zallen, Senior Attorney, Regional Solicitor's Office, Denver
William R. McConkie, Attorney-Adviser, Salt Lake City
Barbara N. Coen, Attorney-Adviser
David Moran, Attorney-Adviser
Angela M. Kelsey, Attorney-Adviser



Uintah and Ouray Reservation



Legend

- Pre-1902 boundary
- Reduced boundary

0 12.5 25 50 Miles

Spirit Lake Reservation

